Supreme Court of the United States

October Term, 1957

No. 189

MILTON KNAPP,

Petitioner,

against.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

RESPONDENTS' BRIEF

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INDEX

Table of Cases Cited

Statutes Cited

Other Authorities

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Statement

This case is before the Court on a writ of *certiorari* to the New York Court of Appeals granted on October 14, 1957 (355 U. S. 804; R. 104-5), to review a final order of that Court unanimously affirming, without opinion [2 N. Y. (2d) 913; 975], an order of the Appellate Division of the Supreme Court, First Department, which affirmed, with opinion [2 App. Div. (2d) 579], an order of a Special Term of the New York Supreme Court, New York County, entered July 3, 1956, which denied and dismissed the petitioner's application under Article 78 of the New York

Civil Practice Act to review a judgment of the Court of General Sessions, New York County (SCHWEITZER, J.), rendered May 22, 1956, adjudging the petitioner in contempt of court (Judiciary Law, §§750, 751) and sentencing him to thirty days imprisonment in the civil jail and to pay a fine of two hundred and fifty dollars.

Statutes Involved

In addition to those provisions of federal law and the Constitution of the United States set forth in petitioner's brief (pp. 4-5), the following statutes of the New York State Penal Law are herein involved:

"§380. Bribery of labor representatives

1. A person who gives or offers to give any money, property or other thing of value to any duly appointed representative of a labor organization with the intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor.

2. Any duly appointed representative of a labor organization who solicits or accepts or agrees to accept from any person any money, property or other thing of value upon any agreement or understanding express or implied, that he shall be influenced in respect to any of his acts, decisions, or other duties as such representative, or upon any agreement or understanding, express or implied, that he shall refrain from causing or shall prevent a strike or work stoppage or any form of injury to any business, is guilty of a misdemeanor.

3. In any criminal proceeding before any court, magistrate or grand jury, for a violation of this section, the court, magistrate or grand jury may confer

immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§381. Offender a competent witness; witnesses' immunity

• • •

2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or,

3. Falsely to institute or maintain an action or special proceeding; or,

4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or,

5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property be-

longing to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor."

"§584. Witnesses' immunity

In any criminal proceeding before any court, magistrate, or grand jury, or upon any investigation before any joint legislative committee for or relating to a violation of any of the provisions of this article, the court, magistrate or grand jury, or the committee, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§850. Extortion defined

Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right."

"§2447. Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with

the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. 'Competent authority' as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him. Added L. 1953, c. 891, §1, eff. Sept. 1, 1953."

The Facts and the Proceedings Below

On April 23, 1956, Milton Knapp, the petitioner herein, was called as a witness before the April 1956 New York County Grand Jury, which was then investigating possible violations of sections 380, 580, and 850 of the New York Penal Law (Bribery of Labor Representatives, Conspiracy and Extortion, respectively) (R. 81). Following his refusal to answer a certain question on the ground that the answer might tend to incriminate him (*ibid.*), the petitioner was directed to answer and was offered complete immunity from prosecution on account of any matters which might thereby be disclosed, pursuant to the provisions of section 2447 of the New York Penal Law (*ibid.*; pp. 4-6, *supra*).

On April 25, the petitioner returned and again refused to answer questions dealing with his relationship, as an employer, with certain named union officials, and probing certain financial transactions between them (R. 15, 17-23). He persisted in his refusal, although directed to answer by the foreman, reminded of the immunity offered him, advised of his possible liability for contempt, and given an opportunity to confer with his lawyer outside the grand jury room (*id.*). The petitioner was then directed to appear before the Court of General Sessions, New York County, where Honorable Mitchell D. Schweitzer, a respondent herein, after a hearing, ruled the questions proper and directed the petitioner to answer them (R. 33). On his next appearance before the grand jury, the petitioner again declined to answer on the same grounds (37-41).

He was once more brought before Judge SCHWEITZER in General Sessions on April 30, at which time the Dis-

trict Attorney requested that the petitioner be adjudged in contempt of court (R. 36). After oral argument, the submission of briefs by both sides, and several more adjournments, the petitioner expressed his continuing refusal to comply with the direct order of the court to answer, and, on May 22, 1956, he was adjudged in contempt of court and sentenced to serve 30 days in jail and to pay a fine of two hundred and fifty dollars (R. 41, 76, 81-90).

Thereupon, on May 22, 1956, the petitioner applied to the New York Supreme Court, pursuant to Article 78 of the New York Civil Practice Act, to review the contempt adjudication, and to restrain the respondents herein from taking any action on the matter (R. 3-6). His petition asserted, among other grounds, inadequacy of the immunity offered as protection from possible federal prosecution under the Taft-Hartley law (R. 5).

Other grounds alleged are no longer at issue.

After hearing oral argument, and considering briefs, papers and memoranda submitted, the Supreme Court dismissed and denied the petition in all respects (R. 1-2, 91).

The Appellate Division unanimously affirmed the order of the Supreme Court (R. 91-2). In its opinion [2 A. D. (2d) 579; R. 93-100], the Court held that the immunity offered by the grand jury was sufficient protection for the petitioner and he was, therefore, required to testify.

The New York Court of Appeals affirmed unanimously, without opinion [2 N. Y. (2d) 913; R. 101-2], later amending its remittitur to state that the federal question here involved had been presented and passed upon [2 N. Y. (2d) 975; R. 102-4].

Summary of Argument

The respondents' attempt to compel the petitioner to testify before a New York grand jury, pursuant to a statute offering him immunity from prosecution on account of his testimony, contravened no right or prohibition enunciated in the United States Constitution.

Even were the Fifth Amendment of the Federal Constitution, embodying the privilege against self-incrimination, applicable to and binding upon the states, the action of the New York officials in the instant case did not amount to any abridgement of that privilege. Under the provisions of New York State law, the petitioner was offered full immunity from prosecution in New York and insulation against future use in New York of the evidence thus obtained.

Such protection constitutes full and complete compensation for compelling a witness to testify against himself, notwithstanding the remote and unsubstantial possibility that a prosecution may occur in some other jurisdiction on account of, or making use of, the testimony thus elicited.

This well settled rule, derived from English common law, has been repeatedly applied by this Court in those cases where incriminating testimony is obtained under similar immunity provisions of the federal government, which operates squarely under the restrictions of the Fifth Amendment.

Although there may be cases in which real and impending cross-jurisdictional danger might be shown, no such

situation here obtains. In the instant case, there is no valid demonstration that the petitioner's peril is any more substantial or immediate than in the ordinary or typical case where a federal crime exists in the field concerning which a witness testifies. An alleged "policy of cooperation" between federal and state prosecutors, upon which the petitioner relies, is vague and, realistically speaking, wholly illusory. Moreover, if an active conspiracy actually did exist between the New York and federal jurisdictions, the evidence so obtained against the witness, this Court has declared, would be inadmissible in a federal court.

The foregoing discussion has proceeded upon the assumption that the Fifth Amendment controls the states as well as the federal Government. This assumption is, of course, contrary to the unbroken line of decisions of this Court. That the Amendment itself restricts only the federal government can hardly be challenged, and this Court has consistently rejected the contention that the Bill of Rights was incorporated by reference in the Fourteenth Amendment and thereby made applicable to the states.

Neither the "privileges and immunities" clause nor the "due process" clause of the Fourteenth Amendment is automatically offended by a state which fails to observe one or another of the specific provisions of the Bill of Rights. Rather, this Court has employed the Fourteenth Amendment, and particularly the "due process" clause thereof, to invalidate only such state action as infringes those basic and fundamental principles constituting the essence of ordered liberty. Specifically, the privilege against self-incrimination has been repeatedly examined and found to be without the orbit of the Fourteenth Amendment. Indeed, it has been held that a state could abolish the privi-

lege altogether without transgressing upon the constitutional concept of due process of law.

Even in the view most favorable to the petitioner's argument, the instant case does not present anything comparable to a total abrogation of the privilege principle. New York, fully respecting the privilege, has compensated the witness for his testimony with the strongest shield against subsequent prosecution which it can forge. Thus, completely protected in New York, the witness faces only the bare possibility of jeopardy in some other jurisdiction.

To hold, under the circumstances of the instant case, that New York denied the petitioner due process of law within the meaning of the Fourteenth Amendment would be wholly inconsistent with the entire line of decisions of this Court and would amount to a perversion of the concept of justice which has traditionally governed the construction of the Amendment.

Moreover, to strike down as unconstitutional the interrogation of the petitioner in the instant case, would be to emasculate the vital immunity statutes of every state in the Union. In effect, the states would be rendered powerless to conduct investigations and prosecutions in those areas of particularly pernicious criminal activity where virtually all important evidence rests in tainted hands. The resultant harm to orderly criminal law enforcement would be incalculable.

Argument

Adjudged in contempt for refusing to answer questions before a New York grand jury as to whether he had made payments to labor union representatives—a criminal act under the laws of New York[1]—the petitioner justifies his refusal on the ground that his federal constitutional rights under the Fifth Amendment, and perhaps under the Fourteenth,[2] were violated by an attempt to compel testimony from him pursuant to a statute immunizing him from prosecution in New York for or on account of any matter revealed by such prospective testimony.[3]

In effect, the petitioner's contention challenges the New York immunity provision as not according protection from criminal prosecution as broad as the self-incrimination privilege destroyed because, though fully insulating a witness from the use of compelled testimony against him in any criminal proceeding in New York tribunals, and from any New York prosecution with respect to the subject matter thereof, it does not similarly protect him from possible testimonial detriment in the federal courts.[4]

The possibility of future federal prosecution exists in this case, it is urged, because bribery of labor union representatives—the subject of the grand jury inquiry herein—

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[1] N. Y. Penal Law, §380, pp. 2-3, *supra*.

[2] See petitioner's brief, pp. 12, 21, 22.

[3] N. Y. Penal Law, §§381, 2447, pp. 3, 4-6, *supra*.

[4] While never explicitly stated, this argument, essential to the petitioner's cause, is implicit in his numerous references to the anticipated danger of federal prosecution (see petitioner's brief, *passim*).

constitutes a crime under the Taft-Hartley Act[5] as well as under the New York Penal Law. And this possiblity becomes a realistic danger, the petitioner contends, by virtue of an announced general policy of cooperation in labor racketeering matters between the United States Attorney for the Southern District of New York and the District Attorney of New York County.[6]

We demonstrate below, first, that even were this case controlled by the Fifth Amendment of the federal Constitution, there is nothing in the situation at bar which abridged the petitioner's privilege against self-incrimination. Secondly, we show that, even could the present operation of the New York immunity statute in question be deemed violative of the privilege as enunciated in the Fifth Amendment, there would be no constitutional infringement of either the Fifth Amendment or the Fourteenth, since (a) the Fifth is not applicable to or binding upon the states, and (b) the Fourteenth does not encompass matters of the sort at hand.

A. Even assuming the applicability of the Fifth Amendment to the states, no violation of the privilege principle contained therein occurred.

In framing its immunity statutes, a state offers a witness, in return for its withdrawal of the privilege against

[5] Labor-Management Relations Act, §302; 29 U. S. C. §186; 61 Stat. 157.

[6] See petitioner's brief, pp. 11-12. Although the source of the alleged policy of cooperation is nowhere specified, it is presumed that the petitioner refers to a statement by Hon. Paul W. Williams, U. S. Attorney for the Southern District of New York, reported in the press, announcing a general policy of cooperation in the prosecution of "racketeers." See, *e.g.*, New York Times, March 14, 1956, p. 1, col. 1.

self-incrimination, all the immunity and protection it can, which of necessity is confined to exemption of the witness from prosecution in its own courts and from the use of compelled evidence therein.[7] Neither New York nor any other state possesses the power to grant immunity from prosecution in a federal court or protection from the use of compelled evidence in a federal court.[8]

In enacting immunity provisions for the federal jurisdiction, of course, the Congress may, by virtue of the federal supremacy clause,[9] forbid any use of the federally compelled evidence not only in the federal criminal courts but in the state courts as well.[10]

In each of two cases arising near the turn of the century, *Brown* v. *Walker*[11] and *Hale* v. *Henkel*,[12] the contention was advanced that certain federal immunity provisions violated the privilege against self-incrimination as embodied in the Fifth Amendment, because they failed to preclude the use in state courts of evidence federally compelled thereunder. In the *Brown* case, this Court construed the particular provision otherwise, holding that its protection did extend to

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[7] *Jack* v. *Kansas*, 199 U. S. 372; *Feldman* v. *United States*, 322 U. S. 487.

[8] *Jack* v. *Kansas* (*supra*, n. 7) at p. 380; *Dunham* v. *Ottinger*, 243 N. Y. 423.

[9] United States Constitution, Art. 6, cl. 2.

[10] *Brown* v. *Walker*, 161 U. S. 591, 606-607; *Adams* v. *Maryland*, 347 U. S. 179; *cf. United States* v. *Saline Bank*, 1 Pet. 100.

[11] 161 U. S. 591.

[12] 201 U. S. 43.

state proceedings.[13] In each case, however, the Court held that, even assuming the exemption to be limited as claimed, the Fifth Amendment was not violated because of the possibility of a state thereafter using the evidence obtained against the federal witness.[14]

At about the same time, in the case of *Jack* v. *Kansas*,[15] a similar contention was made in the reverse situation, namely, with respect to a state immunity provision which did not, as it could not, prevent the use in federal courts of state compelled evidence. While the Fifth Amendment itself was not applicable in that case, this Court held, on the reasoning of *Brown* v. *Walker*, that, in any event, a state immunity provision is not constitutionally defective because it does not extend protection beyond its own jurisdiction.[16]

These conclusions are partially based upon the historic principle that the state and federal governments operate as "separate and distinct sovereignties";[17] that, generally speaking, each acts independently within its particular sphere; and, hence, that the validity of an immunity statute and the sufficiency of the exemption accorded are to be judged from the standpoint of whether the statute extends complete protection within the legislating

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[13] 161 U. S. 591, 607-608.

[14] 161 U. S. 591, 608; 201 U. S. 43, 68-69.

[15] 199 U. S. 372.

[16] See also *United States* v. *Murdock*, 284 U. S. 141; *United States* v. *St. Pierre* (C. C. A. 2d) 128 F. (2d) 979.

[17] *Abelman* v. *Booth*, 21 How. 506, 516; *Ponzi* v. *Fessenden*, 258 U. S. 254, 261.

jurisdiction itself.[18] The general rule evolving from this doctrine is succinctly stated in *United States* v. *Murdock*:[19]

> "The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

It may be true that, where a federal crime exists covering the subject matter of a state examination of a witness, a subsequent federal prosecution of the witness is possible, and that, in that event, the state compelled evidence might conceivably be used to his detriment. This possibility, it is to be noted, results not alone from the existence of the state immunity provisions, which are designed merely to produce evidence for the state's own use, but from decisions of this Court rendering such evidence admissible in the federal courts.[20]

The decisions have evaluated this possibility of federal evidentiary use in making the determination of whether a jurisdictionally limited state immunity offer in any way offends the federal Constitution. The conclusion reached by this Court in the leading cases is that, ordinarily, the bare possibility of federal use is so unsubstantial and remote that no immunity deficiency and, hence, no violation of the self-incrimination privilege can be predicated.[21]

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[18] *Hale* v. *Henkel*, 201 U. S. 43, 69; *Feldman* v. *United States*, 322 U. S. 487. This doctrine follows the English common law rule set forth in *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1049, 1068.

[19] 284 U. S. 141, 149.

[20] *Feldman* v. *United States*, 322 U. S. 487; see also *Jack* v. *Kansas*, 199 U. S. 372, 380.

[21] *Brown* v. *Walker*, 161 U. S. 591; *Hale* v. *Henkel*, 201 U. S. 43. See, also, *Queen* v. *Boyes*, 1 B. & S. Q.B. 311, 330-331.

In effect, these decisions establish a presumption of remoteness in the average or typical case: a case where the principal factor suggesting a possibility of foreign prosecution is merely the existence of a foreign statute rendering the activities under investigation criminal in the particular foreign jurisdiction. Such was the situation in *Jack* v. *Kansas*,[22] for example, where the claim of substantial danger rested almost entirely upon the circumstance that a Kansas anti-trust proceeding might, through the employment of a Kansas immunity provision, produce evidence from a witness enmeshing him in federal anti-trust violations. And it is to be observed in this connection that the existence of federal bribery provisions covering the subject matter of the state inquiry in the present case no more creates a real and substantial danger of federal prosecution here than did the existence of the federal anti-trust laws at the time of the state anti-trust proceeding involved in *Jack* v. *Kansas*.

It is conceivable that a case of substantial danger might arise by virtue of certain extraordinary circumstances, such as the pendency or actual commencement of a foreign criminal proceeding against a person, based upon the very matters about which a grand jury or other agency is contemporaneously interrogating him.[23]

Here, however, nothing of that nature appears, and there is no feature of this case which distinguishes it from the typical situation exemplified by *Jack* v. *Kansas*. Nor is this conclusion affected by the petitioner's reference to a so-called announced policy of cooperation between

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[22] 199 U. S. 372.

[23] See, *e.g.*, *Ballman* v. *Fagin*, 200 U. S. 186; *United States* v. *Di Carlo* (D.C., N.D. Ohio E. D.) 102 F. Supp. 597.

the federal and local prosecutors with respect to labor racketeering.[24]

This asserted "policy" appears vague and general at best. There is no indication whatever of any federal proceeding pending against this petitioner, under the Taft-Hartley Law or otherwise, nor of any intention on the part of any federal agency to initiate one. There is not the slightest suggestion of joint action with respect to the petitioner, nor, indeed, of any interest in him on the part of the United States Attorney. Even if there were, moreover, it is highly questionable whether the latter official could obtain the grand jury testimony sought, protected, as it would be, by New York statutes prohibiting disclosure thereof.[25]

It seems clear that the petitioner, unable to show any real danger of federal prosecution, has erected a phantom peril in the form of the aforementioned general "policy." The fears expressed by the petitioner on this score seem conveniently assumed, highly illusory and, indeed, purely in the nature of afterthought. As a matter of fact, the "policy" of cooperation underlying the petitioner's asserted anxiety was not even mentioned during the extensive proceedings leading up to the contempt adjudication, and no reference to it was made until the tail end of the pleadings submitted in the first court of review (R. 9).

Assuming, however, that this "policy" were construed to embrace cooperation between federal and local prosecutors

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[24] See note 6, *supra*.

[25] N. Y. Code of Criminal Procedure, §§258, 259, 952t; N. Y. Penal Law §§1782, 1783, 1784.

with respect to this specific case, the petitioner could not have been injured thereby. In that circumstance, as pointed out by a lower appellate Court herein,[26] the opinion in *Feldman* v. *United States* would preclude the use in a federal court of any New York grand jury testimony obtained from the petitioner.[27] And, on the other hand, if the "policy" in question did not affect him, he was not in any real or substantial danger within the meaning of the decisions.

However viewed, therefore, no aspect of this case violates the privilege against self-incrimination as that principle is understood in connection with the Fifth Amendment.

B. Even assuming an impairment of the privilege against self-incrimination, no violation of the Fifth or Fourteenth Amendments occurred.

Were all the foregoing to be rejected, and were we to assume, *arguendo*, that the interrogation of the appellant pursuant to the New York immunity statute constituted an infringement of his self-incrimination privilege as that privilege has been enunciated in the Fifth Amendment, the appellant's cause would be no more impressive.

In the first place, the alleged privilege impairment could not be deemed a violation of the Fifth Amendment itself, since it is axiomatic that that Amendment, as a part of the Bill of Rights, is not applicable to or controlling upon the states.[28] Any contention of constitutional depriva-

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[26] 2 App. Div. (2d) 579, 585-586.

[27] 322 U. S. 487, 494.

[28] *Barron* v. *Baltimore*, 7 Pet. 243; *Jack* v. *Kansas*, 199 U. S. 372, 379-380; *Twining* v. *New Jersey*, 211 U. S. 78, 92; *Gaines* v. *Washington*, 277 U. S. 81, 85.

tion, therefore, necessarily must be asserted under the Fourteenth Amendment.

It is also well settled that the Fourteenth does not embrace the Fifth nor any of the other first eight Amendments.[29] In short, the Bill of Rights is not deemed an enumeration of the "privileges" and "immunities" referred to in the Fourteenth Amendment,[30] nor does a state's failure to abide by the mandates of the first eight Amendments automatically amount to a lack of "due process of law."[31]

A violation of due process, this Court has repeatedly held, occurs only upon a flagrant transgression of the most basic concepts of American justice.[32] It involves inequities offending "those canons of decency and fairness which express the notions of justice of English-speaking peoples,"[33] which constitute "the very essence of a scheme of ordered liberty,"[34] and which are ranked as "fundamental"

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[29] *Slaughter-House Cases*, 16 Wall. 36; *Twining* v. *New Jersey* (*supra*, n. 28); *Adamson* v. *California*, 332 U. S. 46.

[30] *Slaughter-House Cases* (*supra*, n. 29); *Maxwell* v. *Dow*, 176 U. S. 581; *Adamson* v. *California* (*supra*, n. 29) at p. 51.

[31] *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319, 323; *Adamson* v. *California*, 332 U. S. 46.

[32] *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; see, *e.g.*, *Palko* v. *Connecticut* (*supra*, n. 31).

We do not herein review the arguments for the well settled rule that the first eight Amendments are not embraced by the phrase "privileges or immunities" occurring in the Fourteenth Amendment [see, *e.g.*, *Maxwell* v. *Dow*, 176 U. S. 581] notwithstanding petitioner's offhand reference to the clause (brief p. 22).

[33] *Adamson* v. *California* (*supra*, n. 31) at p. 67.

[34] *Palko* v. *Connecticut* (*supra*, n. 31) at p. 325.

because they "lie at the base of all our civil and political institutions."[35]

Pursuant to this standard, many accepted safeguards familiar to American jurisprudence are not regarded as essential to due process. The right to accusation by indictment,[36] for example, the right to a jury trial,[37] and protection from double jeopardy[38] fall outside the concept of due process. So also does the privilege against self-incrimination.[39]

Such was the explicit holding of *Twining* v. *New Jersey*,[39] where it was flatly declared that the entire privilege against self-incrimination could be abolished without offense to due process. And that doctrine has been repeatedly endorsed in subsequent opinions of this Court.[40]

So far as due process is concerned, therefore, the New York provision at hand would be constitutionally valid though it offered no immunity or protection whatever, even in the New York courts, in return for the evidence which it compels. In fact, however, neither the statute nor its operation in this case entails anything comparable to a total abolition of the privilege principle, nor to a complete emasculation thereof through failure to accord any immunity in return for its abridgement.

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[35] *Hebert* v. *Louisiana*, 272 U. S. 312, 316; *Snyder* v. *Massachusetts* (*supra*, n. 32) at p. 105.

[36] *Hurtado* v. *California*, 110 U. S. 516.

[37] *Maxwell* v. *Dow*, 176 U. S. 581.

[38] *Palko* v. *Connecticut* (*supra*, n. 31).

[39] 211 U. S. 78.

[40] *Adamson* v. *California* (*supra*, n. 31); *Palko* v. *Connecticut* (*supra*, n. 31); *Snyder* v. *Massachusetts* (*supra*, n. 32).

Quite to the contrary, New York respects the privilege principle and agrees that it should never be rendered inoperative without adequate compensation.[41] In withdrawing the privilege for present purposes, as already noted, it has offered its witnesses all the protection within its power by extending them immunity from any prosecution within its jurisdictional borders which might otherwise result from the testimony compelled.

Realistically, at least, this is a very satisfactory *quid pro quo*. It leaves here only the very unlikely possibility of detriment in another jurisdiction based upon a series of highly speculative contingencies, namely, that a federal prosecution under the Taft-Hartley Law might be instituted against the petitioner grounded upon the subject matter of the grand jury inquiry at bar; that, if it were, the grand jury minutes might become available to the federal prosecutor; and that, under such circumstances, he might choose to use them.

It is these shadowy possibilities, the petitioner necessarily contends, which so shock the American conscience as to require a declaration that the due process clause has been violated. To so hold, we submit, would be to distort the traditional spirit and meaning of the Fourteenth Amendment.

The effect of such a holding, moreover, would be to cripple the administration of state criminal laws in those vital areas where immunity statutes are employed. The instant situation is but one of many where the testimony sought from a witness under an immunity provision may

[41] See New York Constitution, Art. I, §6. See also *People v. Breslin*, 306 N. Y. 294, 296-297; *Matter of Doyle*, 257 N. Y. 244, 250-251.

incidentally indicate the commission by him of a federal crime. This Court is here asked to rule that, in every such instance, the state immunity laws are impotent.

The consequent hardship would be incalculable. The purpose of immunity statutes is, of course, to obtain evidence from tainted sources which otherwise would be barricaded behind the privilege. Especially in the investigation and prosecution of racketeering and other organized crime, vital evidence is frequently found exclusively in those mouths which would remain tightly closed were it not for immunity provisions. "Indeed, in the United States, or some of them," Wigmore has observed, "it is difficult to conceive how the law could ever have succeeded in punishing certain insidious offences without thus clearing the way for justice."[42]

This, apparently, is the thought of the state legislatures throughout the nation. New York alone has enacted 48 immunity provisions, covering those areas of investigation where tainted or accomplice testimony is deemed most necessary;[43] and similar provisions exist in varying numbers in most of the other states.[44] This, perhaps, is the best indication of the value of the immunity statute method of obtaining testimony, for "the frequent and increasing resort to it seems to show how necessary it is found to be."[45]

Bearing this in mind, it is patent that the judicial approach to these immunity provisions should not take

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[42] 8 Wigmore on Evidence (3rd Ed. 1940) §2281, p. 501.

[43] See Third Report of New York State Crime Commission, New York Legislative Document (1953) No. 68, pp. 26-29.

[44] See Wigmore, *op. cit.*, §2281, n. 11, pp. 476-500.

[45] Wigmore, *op. cit.*, §2281, at p. 501.

the form of an assiduous search for technical constitutional defects; rather, the courts should attempt to construe the statutes, if at all possible, as compatible with the Fourteenth Amendment and the federal Constitution in general. That principle finds clear expression in this Court's opinion in *Brown* v. *Walker*:

> "It can only be said in general that the clause [an immunity statute] should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible • • •."[46]

Certainly, it requires no "effort" here "to reconcile" the New York provision in issue, and its operation in this case, with the due process clause of the Fourteenth Amendment. Not only has that reconciliation been established by all the pertinent decisions on the subject, but the unsalutary contrary result could be reached only by a reasoning process both strained and oblivious to realities.

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[46] 161 U. S. 591, 596.

Conclusion

The order of the court below should be affirmed.

Respectfully submitted,

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